A **DATIN SERI ROSMAH MANSOR v. PP & ANOTHER APPEAL**

COURT OF APPEAL, PUTRAJAYA
HANIPAH FARIKULLAH JCA
GUNALAN MUNIANDY JCA
HASHIM HAMZAH JCA
B [CRIMINAL APPEAL NOS: W-05-336-09-2021
& W-05-338-09-2021]
22 MARCH 2022

C **Abstract** – *In the absence of jurisdiction conferred on the criminal court to deal with declaratory reliefs, the criminal court has no power to grant the declaratory reliefs sought, which is a civil remedy. A criminal court cannot be equated with a civil court for the purpose of exercising power relating to grant of declaration; hence the applicant ought to have moved the civil court for the appropriate remedy and not resort to criminal* D *proceedings for the relief sought.*

CRIMINAL PROCEDURE: *Jurisdiction – High Court – Granting of declaratory reliefs – Whether High Court exercising criminal jurisdiction has power to grant declaratory reliefs – Whether subject matter of declaration civil in nature – Whether* E *criminal court could be equated with civil court for purpose of exercising powers relating to grant of declaration – Courts of Judicature Act 1964, s. 22(1)(a), (b) – Criminal Procedure Code*

F The present proceedings concerned two criminal applications brought by the applicant. At the time the applications were filed, the applicant was standing trial in the High Court for criminal charges brought against her. The applicant was facing three charges under s. 16(a)(A) of the Malaysian Anti-Corruption Commission Act 2009 in a criminal trial at the High Court. She was charged with soliciting RM187,500 and accepting gratification of RM6,500,000 in total for herself for a contract worth RM1.25 billion. The G prosecution team was from the onset led by Datuk Seri Gopal Sri Ram ('GSR'). The prosecution succeeded in proving a *prima facie* case against the applicant in respect of all the charges against her. The applicant had, prior to the decision at the end of the prosecution's case, filed an application seeking the production of GSR's letter of appointment to conduct criminal H prosecution for her case under ss. 376(3), 376(3A) and 379 of the Criminal Procedure Code ('CPC'). The applicant's complaint was that the respondent did not produce the fiat despite her request and that GSR's appointment was in doubt until and unless his fiat was produced, as the relevant provisions in the CPC state that an advocate may only conduct a criminal prosecution if I he was authorised in writing. The application was dismissed but the applicant pursued her application *via* an appeal and the outcome was amicable as the

prosecution consented to produce a copy of the letter of appointment for the applicant's perusal. The letter of appointment dated 8 July 2020 was signed by the current Attorney General and addressed to GSR ('first written fiat') and referred to GSR's appointment as a Senior Deputy Public Prosecutor ('Senior DPP') in respect of the affairs of the 1Malaysia Development Berhad ('1MDB'). The contents of the first written fiat precipitated these two applications. The applicant, in the course of the criminal trials at the High Court, filed two inter-related criminal applications *vide* two notices of motion in the High Court. The gist of the orders sought by the applicant was to have GSR disqualified from leading the prosecution as Senior DPP because his written fiat was illegal, irregular and defective. The respondent responded to the applications with, amongst others, an affidavit by Tommy Thomas ('TT') who was the Attorney General from 4 June 2018 until his resignation on 28 February 2020. TT averred that he was empowered, as the Public Prosecutor, to appoint a 'fit and proper person' to be the DPP under s. 376(3) of the CPC and that this provision was distinct from the appointment of an advocate and solicitor of the High Court of Malaya to conduct a single or *ad hoc* criminal prosecution under s. 379 of the CPC. TT had personally appointed GSR as the senior DPP under s. 376(3) of the CPC and had authorised him to conduct the prosecution of some high-profile criminal cases, including the ones against the applicant ('oral fiat'). The respondent's final affidavit contained yet another letter of appointment dated 21 May 2021 ('second written fiat'). The Attorney General in his capacity as the Public Prosecutor and *ex abundati cautela* had made GSR's appointment as a senior DPP under s. 376(3) of the CPC to conduct the cases against the applicant with retrospective effect from 30 August 2018. The key issue before the High Court was whether the appointment of GSR as Senior DPP under the first written fiat was invalid and whether the whole trial was void and illegal and whether the applicant should be acquitted and discharged from all the charges. The High Court Judge ('HCJ'), in dismissing the applicant's applications, stated that there was no necessity to address the validity of the first written fiat or GSR's appointment under it which was the essence of the applicant's application as it had ceased to become a moot point as the HCJ found GSR's appointment by TT under s. 376(3) of the CPC to be valid. With regards to another letter of appointment, the second written fiat, the HCJ took cognisance of the fact that the respondent had issued the second written fiat in an abundance of caution and in reliance on s. 50 of the Interpretation Acts 1948 and 1967. The Public Prosecutor, being an authority empowered to appoint a person to exercise a function, was entitled to make GSR's appointment with retrospective effect as set out under s. 50(b) of this Act and it was not for the courts to question the validity of an Act that confers the power to act retrospectively. The applicant appealed against

the decision of the High Court's refusal to grant the declaration. At the commencement of the hearing of these appeals, the respondent raised a preliminary objection that the orders of the High Court given in the two applications were not appealable as they were (i) made in the course of a trial; and (ii) did not finally dispose of the rights of the parties. The respondent raised, for the very first time, that the High Court in exercising its criminal jurisdiction was not seized with the jurisdiction and power to grant the declaratory reliefs sought by the applicant which was a civil remedy ('second preliminary objection').

Held (dismissing appeals)

Per Hanipah Farikullah JCA delivering the judgment of the court:

(1) Before a court could be held to have jurisdiction to decide a particular matter, it must not only have jurisdiction to try the suit brought before it but it must also have the authority to pass the orders sought. It is not sufficient that the matter is within its jurisdiction in relation to the subject matter of the suit. Its jurisdiction must include the power to hear and decide the questions at issue as well as the authority to hear and decide the particular controversy that has arisen between the parties. (paras 48)

(2) Declaratory reliefs have always been treaded as civil in its essence. Criminal court does not have similar powers as the civil court for it to be deemed as a civil court for the purpose of entertaining a declaration. It must be emphasised that the criminal justice system must avoid becoming involved in civil matters. In fact, there was nothing in s. 22(1)(a) and (b) of the Courts of Judicature Act 1964 that could be construed to confer jurisdiction on the High Court to grant declaratory relief in a criminal application. In the absence of jurisdiction conferred on the criminal jurisdiction of the High Court to deal with declaratory reliefs, the Criminal High Court has no power to grant the reliefs sought by the applicant in both the applications. Considering the fact that the main and only relief asked for was the declaratory relief, therefore, the powers lay in the competent civil courts. (paras 100 & 101)

(3) A perusal of the provisions of the CPC, which lays down the procedure and powers of the Criminal Court, clearly reveals that the criminal court has no power to grant declaratory relief. Therefore, it could not be said that the criminal court could be equated with the civil court for the purpose of exercising powers relating to grant of declaration. As the subject matter of the declaration was civil in nature, the applicant ought to have moved the civil court for the appropriate remedy and not resort to criminal proceedings against the respondent. (paras 102 & 107)

(4) It is well-established that a decree passed by a court without jurisdiction is a nullity and that its validity could be set up whenever and wherever it is sought to be enforced or relied upon – even at the stage of execution and even in collateral proceedings. A defect of jurisdiction whether it is pecuniary or territorial, or whether it is in respect of the subject matter of the action, strikes at the very authority of the court to pass any decree, and such a defect cannot be cured even by consent of parties. The power to create or enlarge jurisdiction is legislative in character. Parliament alone can do it by law and no court can enlarge the jurisdiction of a court. There were thus merits in the second preliminary objection. (paras 108-110)

Case(s) referred to:

AR Antulay v. RS Nayak And Another [1988] 1 MLJ (Crl) 501 ***(refd)***

Ashok Kumar Srivastav v. National Land Insurance Company Ltd JT [1998] 3 SC 519 ***(refd)***

Asia Pacific Higher Learning Sdn Bhd v. Majlis Perubatan Malaysia & Anor [2020] 3 CLJ 153 FC ***(foll)***

Dato' Seri Anwar Ibrahim & Anor v. PP [2000] 3 CLJ 751 CA ***(refd)***

Dato' Seri Anwar Ibrahim v. PP [2010] 7 CLJ 397 FC ***(refd)***

Dato' Sri Mohd Najib Hj Abdul Razak v. PP (Criminal Application No: WA-44-211-12-2018) (Unreported) ***(refd)***

Dato' Sri Mohd Najib Hj Abdul Razak v. PP [2019] 1 LNS 1837 CA ***(refd)***

Dato' Sri Mohd Najib Hj Abdul Razak v. PP (Rayuan Jenayah No: 05(L)-127-05-2019 (W)) (Unreported) ***(not foll)***

Dato' Sri Mohd Najib Tun Hj Abdul Razak v. Peguam Negara & Ors And Another Appeal [2020] 2 CLJ 73 CA ***(refd)***

Garthwaite v. Garthwaite [1964] 2 WLR 1108 ***(refd)***

General Films Exchange Ltd v. His Highness Maharaja Sir Brijnath Singhji Deo Of Maihar & Ors [1975] 2 SCC 530 ***(refd)***

Gouriet v. Union of Post Office Workers & Ors [1977] 3 All ER 70 ***(refd)***

Government Of Malaysia v. Lim Kit Siang & Another Case [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63 SC ***(refd)***

Hanson v. Radcliffe UDC [1922] 2 Ch 490 ***(refd)***

Hari Ram Seghal v. PP [1980] 1 LNS 116 ***(refd)***

Ikebife Ibeneweka And Others Applicants; And Peter Egbuna And Another Respondents [1964] 1 WLR 219 ***(refd)***

Justin Milroy Narakera v. PP [1990] 2 CLJ 226; [1990] 2 CLJ (Rep) 181 HC ***(refd)***

Kamil Azman Abdul Razak & Ors v. Amanah Raya Bhd & Ors [2019] 6 CLJ 419 FC ***(refd)***

Kempadang Bersatu Sdn Bhd v. Perkayuan OKS No 2 Sdn Bhd [2019] 4 CLJ 131 FC ***(refd)***

Kiran Singh v. Chaman Paswan Kiran Singh v. Chaman Paswan [1954] 2 MLJ 60 ***(refd)***

Krishnaveni Ammal And Another v. MD Soundararajan (Deceased) And Others (1944) 2 MLJ 231 ***(refd)***

Ng Chye Huey And Another v. PP [2007] SGCA 3 ***(refd)***

Official Trustee, WB v. Sachindra AIR 1969 SC 823 ***(refd)***

Ong Lai Kim & Ors v. PP [1991] 2 CLJ 1568; [1991] 3 CLJ (Rep) 376 HC ***(refd)***
Panthalakhmammal v. Puthalath AIR 1967 Ker 97 ***(refd)***
Pengarah Tanah Dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd [1978] 1 LNS 143 FC ***(refd)***
PP v. Dato' Seri Anwar Ibrahim & Another Appeal [2010] 4 CLJ 331 CA ***(refd)***
PP v. Datuk Hj Wasli Mohd Said [2015] 1 LNS 14 CA ***(refd)***
PP v. Saat Hassan & Ors [1988] 1 CLJ 80; [1988] 2 CLJ (Rep) 290 HC ***(refd)***
R (Rusbridger) v. Attorney-General [2003] UKHL 38 ***(refd)***
Rosmah Mansor v. PP [2020] 1 LNS 963 HC ***(refd)***
S Selvagomathi v. Chancellor/Governor Of Tamil Nadu Madurai Kamaraj University, Raj Bhavan, Chennai – 600 022 And Others (2018) 4 MLJ 634 ***(refd)***
Salijah Ab Latef v. Mohd Irwan Abdullah Teo [1996] 2 SLR(R) 80 ***(refd)***
Sankey v. Whitlam (1978) 142 CLR 1 ***(refd)***
Sara Lily & Satu Lagi lwn. PP [2004] 7 CLJ 335 HC ***(refd)***
Sun Travels & Tours Pvt Ltd v. Hilton International Manage (Maldives) Pvt Ltd [2019] SGCA 1 ***(refd)***
Tan Boon Hock v. PP [1978] 1 LNS 194 FC ***(refd)***
Uthayakumar Ponnusamy v. YAB Dato' Sri Najib Tun Razak, Perdana Menteri Malaysia & Ors [2017] 6 CLJ 297 CA ***(refd)***
Wing Joo Loong Ginseng Hong (Singapore) Co Pte Ltd v. Qinghai Xinyuan Foreign Trade Co Ltd [2009] 2 SLR(R) 814 ***(refd)***
YAB Dato' Dr Zambry Abd Kadir & Ors v. YB Sivakumar Varatharaju Naidu; Attorney-General Malaysia (Intervener) [2009] 4 CLJ 253 FC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 22(1)(a), (b), 23, 24, 25(1)
Criminal Procedure Code, ss. 4, 5, 323, 376(3), 376(3A), 377, 379
Federal Constitution, arts. 121(1), 122(1), 122A, 122B, 122C, 123, 126
Interpretations Act 1948 and 1967, s. 50(b)
Malaysian Anti-Corruption Commission Act 2009, s. 16(a)(A)
Rules of Court 2012, O. 92 r. 4
Sedition Act 1948, s. 4(1)

Rules of Court [Sing], O. 15 r. 16
Specific Relief Act 1963 [Ind], ss. 34, 41
Specific Relief Act 1877 [Ind], s. 42
Supreme Court of Judicature Act 1969 [Sing], s. 18, First Schedule para. 14

Other source(s) referred to:
Halsbury's Laws of England, 2018, 5th edn, vol 61A, para 107, p 275
Malaysian Civil Procedure 2021, Selangor: Sweet & Maxwell, 2021, vol 1, para 92/4/4, p 1340
Woolf, H, et al, De Smith's Judicial Review, London: Sweet & Maxwell, 2018, 8th edn, para. 18-037, p 1003

For the appellant - Jagjit Singh, Akberdin Abdul Kader, Azrul Stork, Ummi Kartini Abd Latif, Meor Hafiz Salehan, Azalea Nazihah Zulkifli, Ardy Suffian Akberdin & Aaron Yap; M/s Akberdin & Co
For the respondent - Gopal Sri Ram, Ahmad Akram Gharib, Mustaffa Kunyalam, Deepa Nair, Poh Yih Tinn & Fariza Amira Azman; AG's Chamber

[Editor's note: Appeal from High Court, Kuala Lumpur; Criminal Application No: WA-44-117-05-2021 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Hanipah Farikullah JCA:

Introduction

[1] The present proceedings concern two criminal applications brought by the applicant. At the time the applications were filed, the applicant was standing trial in the High Court for criminal charges brought against her. In the applications, the applicant sought a number of declaratory reliefs.

[2] These appeals raise the important question of whether the High Court exercising its criminal jurisdiction has the power to grant the declaratory reliefs sought by the applicant. The effect of the declaration, if it is granted, is that the criminal proceedings which were brought against the applicant in the High Court will be rendered null and void.

[3] The applicant appeals against the decision of the High Court given on 2 September 2021 in which the applicant's applications to disqualify Datuk Seri Gopal Sri Ram ('GSR'), the advocate appointed by the Public Prosecutor, to prosecute the criminal trial against the applicant in the High Court of Kuala Lumpur and also to declare the trial null and void were dismissed. We heard the two appeals together given the commonality of issues raised herein for determination. As will appear, the argument before this court has not preceded on the same basis as before the learned High Court Judge.

[4] After hearing the parties' arguments, we dismissed the appeals and now give the detailed grounds for our decision. We pause here to clarify that we dismissed the applicant's appeals based on the preliminary objection by the respondent. We make no pronouncement on the substantive merits of the applications. We are of the view that the fundamental and incurable jurisdictional defects in the applications made it unnecessary to proceed with the substantive issues.

The Background Facts

[5] The background facts leading to the filing of these appeals are broadly undisputed. We drew them largely from the judgment of the High Court as well as the record of appeals of the instant case.

[6] The applicant is facing three charges under s. 16(a)(A) of the Malaysian Anti-Corruption Commission Act 2009 in Criminal Trial Nos. WA-45-9-03-2019 and WA-45-19-07-2019 at the Kuala Lumpur High Court.

She is charged for soliciting RM187,500,000 and accepting gratification of RM6,500,000 in total for herself. These were concerning the Education Ministry's contract worth RM1.25 billion for Sarawak's rural schools' solar hybrid power system and the operation and maintenance of Genset/Diesel project. The prosecution team was from the onset led by GSR, who retired as a judge in the Federal Court in 2010, and now practises as an advocate and solicitor.

[7] The prosecution concluded its case after 35 days of trial. 23 witnesses had testified for the prosecution. The prosecution succeeded in proving a *prima facie* case against the accused in respect of all the charges against her. The applicant was called to enter her defence. The trial dates for the defence stage had also been fixed.

[8] The applicant had prior to the decision at the end of the prosecution's case filed an application seeking for the production of GSR's letter of appointment to conduct the criminal prosecution for her case under ss. 376(3), 376(3A) and 379 of the Criminal Procedure Code ('CPC'). It was filed on 8 July 2020. The applicant's complaint was that the respondent did not produce the fiat despite her request. The applicant contended that the legality of GSR conducting the prosecution rests on the fiat. The applicant also contended that GSR's appointment was in doubt until and unless his fiat was produced, as the relevant provisions in the CPC state that an advocate may only conduct a criminal prosecution if he was authorised in writing.

[9] The application was, however, dismissed on 19 August 2020 (see *Rosmah Mansor v. PP* [2020] 1 LNS 963, [2020] MLJU 1197 (HC)). The applicant pursued her application *via* an appeal to this court, which heard her appeal on 8 April 2021. The outcome was amicable as the prosecution consented to produce a copy of the letter of appointment for the applicant's perusal.

[10] The letter of appointment dated 8 July 2020 was signed by the current Attorney General, Tan Sri Idrus bin Harun and addressed to GSR ('the first written fiat'). It referred to GSR's appointment as a Senior Deputy Public Prosecutor ('Senior DPP') *via* a letter dated 30 August 2018 in respect of the affairs of the 1Malaysia Development Berhad ('1MDB'). The letter also stated that GSR is employed to conduct the criminal prosecution in respect of the applicant until its conclusion. The contents of the first written fiat precipitated these two applications.

The Applications

[11] On 6 May 2021, the applicant in the course of the criminal trials at the High Court, filed two inter-related criminal applications *vide* two notices of motion in the High Court. The gist of the orders sought by the applicant in these two applications was to have GSR disqualified from leading the prosecution as Senior DPP because his written fiat dated 8 July 2020 was illegal, irregular and defective.

[12] In view of the issues raised in this appeal, it is necessary to reproduce the reliefs sought by the applicant. For the first motion, the applicant sought for the following reliefs: A

(i) suatu perintah deklarasi bahawa pelantikan Datuk Seri Gopal Sri Ram sebagai Timbalan Pendakwa Raya Kanan ('pelantikan tersebut') bagi kes *PP v. Rosmah Mansor* (Kes Jenayah Nos: WA-45-9-03-2019 & WA-45-19-07-2019), di Mahkamah Tinggi Jenayah Kuala Lumpur ('kes solar tersebut'), di bawah s. 376(3) dan s. 379 Kanun Tatacara Jenayah, melalui surat pelantikan (fiat) bertarikh 8 Julai 2020 ('fiat tersebut') adalah salah di sisi undang-undang (illegal), tidak teratur (irregular) dan cacat (defective) di bawah undang-undang yang matan; B C

(ii) suatu perintah deklarasi bahawa pelantikan tersebut melalui fiat tersebut tidak boleh berkuatkuasa secara kebelakangan (retrospective) kerana memprejudiskan hak-hak pemohon di bawah undang-undang;

(iii) suatu perintah deklarasi bahawa fiat tersebut tidak terpakai untuk pendakwaan ke atas pemohon bagi kes solar tersebut kerana Datuk Seri Gopal Sri Ram dilantik sebagai Timbalan Pendakwa Raya Kanan bagi mengetuai kes pendakwaan berkaitan 1Malaysia Development Berhad (1MDB) *inter alia* sepertimana tajuk fiat tersebut; D

(iv) suatu perintah deklarasi bahawa fiat tersebut yang ditandatangani oleh Peguam Negara, Tan Sri Idrus bin Harun pada 8 Julai 2020 (yang sepatutnya ditandatangani oleh Peguam Negara terdahulu, Tan Sri Tommy Thomas, pada dan/atau sebelum 15 November 2018, iaitu tarikh pendakwaan ke atas pemohon), adalah salah di sisi undang-undang; E F

(v) suatu perintah deklarasi bahawa Datuk Seri Gopal Sri Ram dilucut kelayakan (be disqualified) dan/atau dihalang dan/atau diberhentikan dan/atau ditamatkan sebagai Timbalan Pendakwa Raya Kanan di dalam kes solar tersebut, yang bertindak mengetuai pasukan pendakwaan; G

(vi) suatu perintah deklarasi bahawa Datuk Seri Gopal Sri Ram dihalang daripada terus menyertai pasukan pendakwaan (atas apa-apa kapasiti) di dalam kes solar tersebut;

(vii) suatu perintah deklarasi bahawa tindakan Datuk Seri Gopal Sri Ram mengendalikan kes solar tersebut adalah suatu tindakan penyalahgunaan proses mahkamah dan perbuatan menghina mahkamah yang mulia ini; H

(viii) suatu perintah penggantungan prosiding bagi kes solar tersebut diberikan sementara pelupusan (disposal) notis usul ini; dan I

(ix) apa-apa perintah lanjut atau relief yang difikirkan suai manfaat oleh mahkamah yang mulia ini.

[13] Meanwhile, for the second motion, the orders sought are for the following:

(i) suatu perintah deklarasi bahawa prosiding perbicaraan penuh bagi kes *PP v. Rosmah Mansor* (Kes Jenayah Nos: W A-45-9-03-2019 & WA-45-19-07-2019), di Mahkamah Tinggi Jenayah Kuala Lumpur ('kes solar tersebut'), pada peringkat pendakwaan yang berlangsung semenjak 15 November 2018 sehingga pihak pendakwaan menutup kesnya adalah tidak sah dan terbatal (null and void), serta berupa suatu perbicaraan silap (mistrial);

(ii) suatu perintah deklarasi bahawa pelantikan Datuk Seri Gopal Sri Ram sebagai Timbalan Pendakwa Raya Kanan ('pelantikan tersebut') bagi kes solar tersebut di bawah s. 376(3) dan s. 379 Kanun Tatacara Jenayah, melalui surat pelantikan (fiat) bertarikh 8 Julai 2020 ('fiat tersebut') adalah salah di sisi undang-undang (illegal), tidak teratur (irregular) dan cacat (defective) di bawah undang-undang yang matan;

(iii) suatu perintah deklarasi bahawa pelantikan tersebut melalui fiat tersebut tidak boleh berkuatkuasa secara kebelakangan (retrospective) kerana memprejudiskan hak-hak pemohon di bawah undang-undang;

(iv) suatu perintah deklarasi bahawa fiat tersebut tidak terpakai untuk pendakwaan ke atas pemohon bagi kes solar tersebut kerana Datuk Seri Gopal Sri Ram dilantik sebagai Timbalan Pendakwa Raya Kanan bagi mengetuai kes pendakwaan berkaitan 1Malaysia Development Berhad (1MDB) *inter alia* sepertimana tajuk fiat tersebut;

(v) suatu perintah deklarasi bahawa fiat tersebut yang ditandatangani oleh Peguam Negara, Tan Sri Idrus bin Harun pada 8 Julai 2020 (yang sepatutnya ditandatangani oleh Peguam Negara terdahulu, Tan Sri Tommy Thomas, pada dan/atau sebelum 15 November 2018, iaitu tarikh pendakwaan ke atas pemohon), adalah salah di sisi undang-undang;

(vi) suatu perintah deklarasi bahawa tindakan Datuk Seri Gopal Sri Ram mengendalikan kes solar tersebut adalah suatu tindakan penyalahgunaan proses mahkamah dan perbuatan menghina mahkamah yang mulia ini;

(vii) suatu perintah deklarasi bahawa oleh kerana prosiding kes solar tersebut adalah tidak sah dan terbatal (null and void), serta berupa suatu perbicaraan silap (mistrial), maka pemohon, selaku orang kena tuduh (OKT) di dalam kes solar tersebut tidak perlu membela diri;

(viii) suatu perintah deklarasi bahawa pemohon dilepaskan dan dibebaskan (acquitted and discharged) daripada semua pertuduhan-pertuduhan yang dihadapinya di bawah s. 16(a)(A) Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 (Akta 694) di dalam kes solar tersebut;

(ix) suatu perintah penggantungan prosiding bagi kes solar tersebut diberikan sementara pelupusan (disposal) notis usul ini; dan

(x) apa-apa perintah lanjut atau relief yang difikirkan suai manfaat oleh mahkamah yang mulia ini.

[14] The respondent responded to the applications with, amongst others, an affidavit by Tommy Thomas ('TT'). He was the Attorney General from 4 June 2018 until his resignation on 28 February 2020. TT averred that he was empowered as the Public Prosecutor at the material time to appoint a "fit and proper person" to be the Deputy Public Prosecutor ('DPP') under his "general control and direction" under s. 376(3) CPC and that this provision is distinct from the appointment of an advocate and solicitor of the High Court of Malaya to conduct a single or *ad hoc* criminal prosecution under s. 379 CPC. TT further averred that he had personally appointed GSR as the Senior DPP under s. 376(3) CPC and had authorised him to conduct the prosecution of some high-profile criminal cases, including the ones against the applicant ('the oral fiat'). TT took the view that there was no requirement for GSR's appointment to be in writing, unlike an appointment under s. 379 CPC (which requires it to be in writing), an appointment under s. 376(3) CPC does not require one, as the person appointed, in the words of the section itself, would be under his "general control and direction" as the Public Prosecutor. TT also highlighted that GSR had been leading the prosecution's team from the onset and that it was public knowledge being a high-profile case. He averred that it would be incredulous for GSR to conduct the prosecution's case with a team of prosecutors from the Attorney General's Chambers without his sanction.

[15] TT also pointed out in his affidavit that this was not the first time that GSR's appointment as a Senior DPP had been challenged, as the accused in *Dato' Sri Mohd Najib Hj Abdul Razak v. PP* (Criminal Application No. WA-44-211-12-2018), had also mounted a similar challenge, and that the application had been dismissed at all levels, ending at the apex court.

[16] The applicant refuted TT's averment. She alleged TT of blatantly lying as there would have been no necessity for his successor to produce the first written fiat if there was any truth to his version. The applicant had also referred to an extract of a book written by TT with the title "*Justice in the wilderness*", and cited the following passage in the book:

> I appointed Sri Ram, under section 376(3), to deal with the investigation and prosecution of 1MDB matters.
>
> She pointed out that TT had merely mentioned GSR's appointment for the 1MDB matters and never once mentioned that his appointment was also for her cases. TT in response stated that he had no knowledge about the first written fiat and maintained that GSR's appointment was through the oral fiat.

[17] The respondent's final affidavit contained yet another letter of appointment dated 21 May 2021 for GSR ('the second written fiat'). The Attorney General, in his capacity as the Public Prosecutor and *ex abundati cautela* has made GSR's appointment as a senior DPP under s. 376(3) CPC to conduct the cases against the applicant with retrospective effect from 30 August 2018. The contents are as follows:

> Appointment as Senior Deputy Public Prosecutor under section 376(3) of the Criminal Procedure Code
>
> In exercise of the powers conferred upon me as Public Prosecutor under section 376(3) of the Criminal Procedure Code (Act 593). I, Tan Sri Idrus bin Harun, Public Prosecutor, hereby appoint Datuk Seri Gopal Sri Ram to be Deputy Public Prosecutor and designate the appointment as Senior Deputy Public Prosecutor with effect from 30th August 2018 to exercise all or any of the rights and powers vested in or exercisable by or under the Criminal Procedure Code (Act 593) and specifically to conduct the prosecution in *PP v. Datin Seri Rosmah binti Mansor* (Kuala Lumpur High Court Criminal Case No. WA-45-9-03-2019; Kuala Lumpur Sessions Court Criminal Case No. WA-62R-54-11-2018) and *PP v. Datin Seri Rosmah Binti Mansor* (Kuala Lumpur High Court Criminal Case No. WA-45-19-07-2019; Kuala Lumpur Sessions Court Criminal Case No. WA-62R-18-04-2019 including any other criminal applications and appeals related thereto.

[18] Against that background, we turn to the decision of the High Court.

Decision Of The High Court

[19] The key issue before the High Court was whether the appointment of GSR as Senior DPP under the first written fiat was invalid and that the whole trial was void and illegal and that she should be acquitted and discharged from all the charges.

[20] In support of her submission, the applicant argued that s. 376(3) must be read together with ss. 377 and 379 CPC, which meant that as an advocate, GSR's appointment could not merely be done orally, as both ss. 377 and 379 CPC stipulate that the appointment of any advocate to conduct a criminal prosecution must be evidenced in writing. In gist, the applicant attacked the appointment of GSR by TT, which was made orally under s. 376(3) CPC and contended that it would still be required to be made in writing and that the absence of it meant that the appointment is invalid.

[21] The learned High Court Judge did not agree with the applicant's contention that the appointment under s. 376(3) CPC must be in writing when there is no express requirement in that section, unlike ss. 377 and 379 CPC.

[22] In this regard, the learned High Court Judge relied on the decision of this court in the case of *Dato' Sri Mohd Najib Hj Abdul Razak v. PP* [2019] 1 LNS 1837; [2019] 5 MLJ 623 where it held as follows:

> [45] We noted that the fact of appointment of GSR under section 376(3) CPC is never in doubt, as counsel had sight of the same.
>
> [46] Hence we do not see the basis of the application for the production of the said LOA. Section 376(3) of the CPC does not require that the appointment be made in writing. Thus, in the absence of the requirement of the appointment to be made in writing, it is a matter of course that the section does not provide for the LOA to be produced upon demand. It is not for the Courts to read and impose procedural requirements into the provisions to rule a non-compliance. This is reading something into the provision which is not there in the first place. The section is unambiguous. The Federal Court case of *Lee Kew Sang v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2005] 3 CLJ 914 has stated that:
>
> > … it is not for the Courts to create procedural requirements because it is not the function of the Courts to make law or rules. If there are no such procedural requirements then there cannot be non-compliance thereof. Only if there is that, there can be non-compliance thereof and only then the Courts should consider whether, on the facts, there has been non-compliance.

[23] The learned High Court had also relied on the affidavit by TT where TT had clearly stated that he had after appointing GSR to lead the prosecution in the 1MDB cases subsequently authorised GSR to conduct the prosecution for the criminal cases against the applicant.

[24] At para. (32) of his judgment, the learned High Court Judge said:

> [32] I believe that the authorisation given by TT to GSR to conduct the criminal prosecution in the applicant's cases was without doubt validly done under section 376(3) CPC in his capacity as the Public Prosecutor. I am resolute that this authorisation need not be evidenced in writing. The applicant's accusation of TT lying is without basis. The fact that TT had in his book mentioned that he had appointed GSR to conduct the prosecution for the 1MDB cases but made no mention of her cases does not mean that he has not done so. It is his prerogative on what to include in his book. As for the first written fiat, TT had in his affidavit in reply stated that he has no knowledge of it, which is not remarkable as it was issued by his successor and that he was no longer involved with the affairs of the Attorney General. That does not dilute the fact that he had appointed GSR when he was in office. That statement is based on his knowledge. I see no reason to doubt the veracity of TTs averment.

[25] The learned High Court Judge proceeded to state that there is no necessity to address the validity of the first written fiat or GSR's appointment under it which is the essence of the applicant's application. They have ceased to become a moot point as the learned High Court Judge has found GSR's appointment by TT under s. 376(3) CPC to be valid.

[26] With regards to another letter of appointment dated 21 May 2021 ('second written fiat'), the learned High Court Judge took cognisance of the fact that the respondent had issued the second written fiat in an abundance of caution and in reliance on s. 50 of the Interpretation Acts 1948 and 1967. He was of the view that the Public Prosecutor, being an authority empowered to appoint a person to exercise a function, as spelt out under s. 50 of the Act, is entitled to make GSR's appointment with retrospective effect as set out under s. 50(b) of this Act and it is not for the courts to question the validity of an Act that confers the power to act retrospectively.

[27] The learned High Court Judge, therefore, dismissed the applicant's applications. The applicant has since appealed against the decision of the High Court Judge's refusal to grant the declaration.

Preliminary Objections

[28] At the commencement of the hearing of these appeals on 15 November 2021 learned Senior DPP for the respondent raised a preliminary objection that the orders of the High Court given in the two applications dated 6 May 2021 are not appealable as they were (i) made in the course of a trial; and (ii) did not finally dispose of the rights of the parties. In support of his argument, learned Senior DPP relied on the judgments of the court in *Dato' Seri Anwar Ibrahim & Anor v. PP* [2000] 3 CLJ 751 and *PP v. Datuk Hj Wasli Mohd Said* [2015] 1 LNS 14; [2015] 3 MLJ 35.

[29] Relying on the case of *Kempadang Bersatu Sdn Bhd v. Perkayuan OKS No 2 Sdn Bhd* [2019] 4 CLJ 131 and *Asia Pacific Higher Learning Sdn Bhd v. Majlis Perubatan Malaysia & Anor* [2020] 3 CLJ 153, it was submitted for the applicant that the order of the High Court dated 2 September 2021 is appealable as it finally disposes of the rights of the parties with regards to disqualification of GSR.

[30] In the course of the proceedings before us, learned Senior DPP in oral submissions raised for the very first time before us that the High Court in exercising its criminal jurisdiction was not seized with the jurisdiction and power to grant the declaratory reliefs sought by the applicant which is a civil remedy.

[31] Learned senior counsel for the applicant immediately indicated that he was taken by surprise by this new preliminary issue and sought this court's indulgence to allow an adjournment as he needed time to consider this issue. The respondent did not object to the adjournment. We ordered both parties to file further submissions and authorities on the issue of whether the High Court sitting in its criminal jurisdiction has the power to issue declaratory reliefs as sought by the applicant in the two applications ('the second preliminary objection'). Consequently, we adjourn the appeal to 6 December 2021.

[32] Even though the issue of jurisdiction was not raised at all by the respondent before the High Court, we adopt the approach of the Federal Court in *Asia Pacific Higher Learning Sdn Bhd v. Majlis Perubatan Malaysia & Anor* [2020] 3 CLJ 153, where Idrus Harun FCJ (Malaya) states as follows:

> [17] I should start off with the first point taken on jurisdiction. The issue is whether the preliminary issue can be raised on an appeal before this court when this issue was not raised at all by the applicant before the Court of Appeal. For my part, I fully accept the propositions advanced by learned counsel for the applicant on the law concerning jurisdiction as broadly correct. In fact, it would not be an exaggeration for me to say that there is always unavoidable and strong inclination on the part of the courts to allow jurisdiction challenge at any stage of proceedings. In saying that I should emphasise as a matter of law, that the court is competent to entertain and try a suit if it were competently brought. However, where no jurisdiction exists or the court has no inherent jurisdiction, the suit is not competently brought and the court therefore has no power to take one more step. In other words, the court is not perfectly competent to entertain and try the suit. Jurisdiction it is often said, does not originate in consent or acquiescence of the parties and cannot be established, where it is absent, by such consent, acquiescence or waiver of rights. A consideration of the authorities such as *Datuk T. P. Murugasu v. Wong Hung Nung* [1988] 1 MLJ 291; *Martego Sdn Bhd v. Arkitek Meor & Chew Sdn Bhd and another appeal* [2018] 4 MLJ 496 COA and Civil Appeal No: 02(f)-2-01-2018 FC [2019] MLJU 742, confirms the propositions which I have expressed.
>
> [18] It is relevant to note that as a general rule, a judicial decision made in want of jurisdiction or in breach of statute would be considered a nullity that is amenable to review at any stage of the proceedings and that the court has inherent powers to set aside non-appealable orders exercisable on its own motion and even if parties did not raise objections as to want of jurisdiction or tacitly acquiesce in the matter or brought by the party which the order purports to affect for that purpose (*Badiaddin bin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 1 MLJ 393). Accordingly, while the respondent is quite correct to regard the preliminary issue was raised at the eleventh hour, I see nothing in the respondents' protestation that the preliminary point was not raised in the intermediate appellate court below us to entitle this Court to refuse to hear it. I reject their argument.
>
> [19] I feel bound to say that, as it stands, it clearly appears that the preliminary point raised by the applicant is beyond the 2 questions of law for which leave to appeal to this Court was granted. However, this Court is not precluded from inquiring into issues which are not part of the leave questions as we are here legitimately concerned with the issue of jurisdiction and I thus feel obliged to say that it is desirable for this Court to deal with any matter including the preliminary issue as raised by the

A applicant which we consider relevant for the purpose of doing complete justice according to the substantial merits of a particular case (*Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd & another appeal* [2005] 3 MLJ 97).

[33] On 6 December 2021, we proceeded to hear the preliminary B objections.

[34] It has been agreed by all parties that this court shall at this stage of the hearing of the appeals confine itself to hear the second preliminary objection by the respondent as it relates to the issue of jurisdiction.

C **[35]** In the event that this court rules on the second preliminary objection in favour of the respondent then this court will proceed to dismiss the appeals. On the other hand, in the event the second preliminary objection is dismissed, then we will proceed to hear the first preliminary objection.

Decision

D **[36]** These two appeals raise a common issue. The central issue of the matter brings into focus whether the sitting High Court in exercising its criminal jurisdiction has the power to issue declaratory reliefs as sought by the applicant.

E **[37]** We have heard the oral submissions by learned counsel for the respective parties at length. We have also given our thoughtful consideration to the written submissions and have gone through the authorities submitted by the parties. While considering the rival submissions, it is important for the purpose of the present appeals to elucidate on the nature of the reliefs sought by the applicant and the jurisdiction that is vested in the High Court.

F **[38]** In both the notices of motion filed in the criminal proceeding, what the applicant wanted in gist was, to disqualify GSR from conducting the trial against the applicant on the ground that his written fiat dated 8 July 2020 was irregular and defective. It is important to determine if the substance of the G declarations sought by the applicant was mere civil matters and not declarations of criminal matters.

[39] The learned Senior DPP argued before us that the criminal High Court is not vested with jurisdiction and power to hear and dispose of the motion as only the civil courts have the jurisdiction to grant the reliefs sought by the H applicants in this case which are declaratory in nature.

[40] Learned Senior DPP drew a distinction between the civil jurisdiction of the High Court of its criminal jurisdiction. In support of his contentions, learned Senior DPP cited the judgment of Tun Salleh Abas LP and Abdul Hamid Omar CJ (Malaya), in the Supreme Court case of *Government Of* I *Malaysia v. Lim Kit Siang & Another Case* [1988] 1 CLJ 219; [1988] 1 CLJ

(Rep) 63; [1988] 2 MLJ 12, wherein it was contended that there is a separation of the system of criminal justice from that of the civil justice system.

[41] It is next argued by the learned Senior DPP that a declaratory relief is a civil remedy and is unavailable within a criminal jurisdiction as was decided by this court in *Uthayakumar Ponnusamy v. YAB Dato' Sri Najib Tun Razak, Perdana Menteri Malaysia & Ors* [2017] 6 CLJ 297; [2017] 1 MLJ 235.

[42] Learned counsel for the applicant, in reply, argued that the criminal High Court has the power to issue a declaration in respect of a criminal application. In support of the applicant's submissions, learned counsel relied mainly on the order of the Federal Court dated 7 August 2019 in *Dato' Sri Mohd Najib Hj Abdul Razak v. PP* (Rayuan Jenayah No: 05(L)-127-05-2019 (W)).

[43] At this juncture, we must remind ourselves of our function in this appeal. It is not disputed by the parties that we are sitting as a criminal court hearing criminal appeals.

[44] In this case, we are not concerned with the usual factors that bear on the discretion to grant or withhold declaratory relief. What we have to decide in these appeals is whether the court acting in its criminal jurisdiction can grant declaratory order in relation to the capacity of GSR to conduct the criminal trial.

[45] Our analysis of the rival submissions must begin with explaining the meaning of the expression 'jurisdiction' and 'declaration' which are relevant in the present controversy.

Jurisdiction

[46] What is the meaning of the word 'jurisdiction'? According to the *Concise Oxford Dictionary* (9th edn), the word 'jurisdiction' means 'a legal or other authority'. In *KJ Aiyer's Judicial Dictionary* (13th edn), the word 'jurisdiction' is illustrated as follows:

(i) the authority or power of a court to entertain and decide on any judicial proceeding; and

(ii) the area over which the power of the court extends.

[47] Jurisdiction is also defined as an authority which a court has to decide a matter litigated before it or to take cognisance of a matter presented in a formal way for its decision (*Panthalakhmammal v. Puthalath* AIR 1967 Ker 97).

[48] Before a court can be held to have jurisdiction to decide a particular matter, it must not only have jurisdiction to try the suit brought before it but must also have the authority to pass the orders sought for. It is not sufficient that the matter is within its jurisdiction in relation to the subject matter of

the suit. Its jurisdiction must include the power to hear and decide the questions at issue as well as the authority to hear and decide the particular controversy that has arisen between the parties (*Official Trustee, WB v. Sachindra* AIR 1969 SC 823 at p. 828; (1969) 2 SCJ 123; (1969) 1 SCA 691; (1969) 2 SCWR 182).

[49] The expression 'jurisdiction' of a court was explained by the Federal Court in *Dato' Seri Anwar Ibrahim v. PP* [2010] 7 CLJ 397; [2011] 1 MLJ 158. Referring to Lord Diplock LJ judgment in *Garthwaite v. Garthwaite* [1964] 2 WLR 1108, the court states:

> [66] The High Court is the creation of statute, and its jurisdiction is statutory. As was pointed out by Pickford LJ in *Guaranty Trust Company of New York v. Hannay & Company* [1915] 2 KB 536 at p 562, the expression 'jurisdiction' of a court may be used in two different senses, a strict sense (which he regarded as the only correct one) and a wider sense … In its narrow and strict sense, the 'jurisdiction' of a validly constituted court connotes the limits which are imposed upon its power to hear and determine issues between persons seeking to avail themselves of its process by reference (1) to the subject matter of the issue or (2) to the persons between whom the issue is joined or (3) to the kind of relief sought, or to any combination of these factors. In its wider sense it embraces also the settled practice of the court as to the way in which it will exercise its power to hear and determine issues which fall within its 'jurisdiction' (in the strict sense) or as to the circumstances in which it will grant a particular kind of relief which it has 'jurisdiction' (in the strict sense) to grant, including its settled practice to refuse to exercise such powers, or to grant such relief in particular circumstances.
>
> This distinction between the strict and the wider meaning of the expression 'jurisdiction' was of little importance in the case of the superior courts so long as they did not owe their origin to statute, for there was no need to distinguish between non-existence of a power and settled practice not to exercise an existing power. In the case, however, of courts created by statute, as the Supreme Court of Judicature, comprising the High Court and the Court of Appeal, has been since 1873, the court has no power to enlarge its jurisdiction in the strict sense but has power to alter its practice *proprio motu* within the limits which it imposes on itself by the doctrine of precedent, subject, however, to any statutory rules regulating and prescribing its practice and procedure made pursuant to any rule-making power contained in the statute.

[50] It is pertinent to note that the High Court, as provided by art. 121(1) of the Federal Constitution has the jurisdiction and powers as may be conferred by or under the Federal law. Sections 22, 23, and 24 of the Courts of Judicature Act 1964 ('CJA') set out in broad terms the criminal and civil jurisdiction of the High Court. Section 25(1) of the CJA provides that the High Court "… shall in the exercise of its jurisdiction have all the powers

which were vested in it immediately prior to Malaysia Day and such other powers as may be vested in it by any written law in force within its local jurisdiction." The High Court also has the additional powers set out in the Schedule to the CJA.

[51] Except for certain articles in the Constitution (see arts. 122(1), 122A, 122B, 122C, 123, 126), the powers and jurisdiction of the High Court are governed by the CJA. In the sphere of criminal jurisdiction, the High Court has three jurisdictions, namely, original, appellate and revisionary. With regards to its original jurisdiction, s. 22(1)(a) of CJA provides as follows:

(1) The High Court shall have jurisdiction to try:

(a) all offences committed:

(i) within its local jurisdiction;

(ii) on the high seas on board any ship or on any aircraft registered in Malaysia;

(iii) by any citizen or any permanent resident on the high seas on board any ship or on any aircraft;

(iv) by any person on the high seas where the offence is piracy by the law of nations; and

(b) offences under Chapters VI and VIA of the Penal Code, and under any of the written laws specified in the Schedule to the Extra-Territorial Offences Act 1976, or offences under any other written law the commission of which is certified by the Attorney General to affect the security of Malaysia committed, as the case may be:

(i) on the high seas on board any ship or on any aircraft registered in Malaysia;

(ii) by any citizen or any permanent resident on the high seas on board any ship or on any aircraft;

(iii) by any citizen or any permanent resident in any place without and beyond the limits of Malaysia;

(iv) by any person against a citizen of Malaysia;

(v) by any person against property belonging to the Government of Malaysia or the Government of any State in Malaysia located outside Malaysia, including diplomatic or consular premises of Malaysia;

(vi) by any person to compel the Government of Malaysia or the Government of any State in Malaysia to do or refrain from doing any act;

(vii) by any stateless person who has his habitual residence in Malaysia;

(viii) by any person against or on board a fixed platform while it is located on the continental shelf of Malaysia; or

(ix) by any person who after the commission of the offence is present in Malaysia.

(2) The High Court may pass any sentence allowed by law.

[52] In terms of criminal procedure, the CPC will be applicable. The CPC, although mainly procedural, also deals with other things – it defines the powers of the criminal court; lays down the procedure to be followed in trials, inquiries, appeals and other proceedings; prescribes the duties of the police in arresting and investigating; contains provisions for the prevention of crime and also rules for the admissibility of evidence.

[53] Reference should be made to the CPC, particularly under Part I Preliminary where it provides, among others, on the applicability of the laws of England and saving of powers of the High Court. To this effect, the relevant provisions are s. 5 and s. 4 of the CPC.

[54] Section 5 of the CPC states that:

Laws of England, when applicable

5. As regards matters of criminal procedure for which no special provision has been made by this Code or by any other law for the time being in force the law relating to criminal procedure for the time being in force in England shall be applied so far as the same shall not conflict or be inconsistent with this Code and can be made auxiliary thereto.

[55] While s. 4 of the CPC states that:

Saving of powers of High Court

4. Nothing in this Code shall be construed as derogating from the powers or jurisdiction of the High Court.

[56] It must be emphasised that s. 5 of the CPC is in relation to matters of criminal procedure for which no special provision has been made by the CPC or by any other law for the time being in force, only then the law relating to criminal procedure for the time being in force in England shall be applicable.

[57] Section 5 of the CPC lays down two preconditions before the courts can adopt and follow English laws on criminal procedure, namely: (i1) there must be a *lacuna* in the CPC; and (ii) the proposed principles of English law on criminal procedure must not be inconsistent with the provisions of the CPC (see *PP v. Dato' Seri Anwar Ibrahim & Another Appeal* [2010] 4 CLJ 331; [2010] 3 AMR 1).

[58] In *Hari Ram Seghal v. PP* [1980] 1 LNS 116; [1981] 1 MLJ 165, the court was asked to exercise its revisionary jurisdiction to dispose of two outstanding appeals, the records of which have become unobtainable. A

Wan Yahya J said at 167 that:

> … the powers of the courts to intervene and make rules not provided in the criminal procedure are inherent and are exercisable to correct any injustice. The power to make rules such as the Judges' Rules, notice of additional evidence and power to expunge words from records are some examples of this inherent power. By virtue of section 5 of our Code, the use of this power could be extended to this country provided, of course, it does not conflict with our statutory provisions. I am convinced that our courts possess similar inherent powers to act, or to intervene, in any matter for which no procedure has been laid down and for the purpose of preventing injustice. B C

[59] In *Hari Ram* (*supra*) His Lordship expressed the view that even if s. 323 of the CPC did not suffice to empower the court to correct a miscarriage of justice and the code contains no provision remedying such error or neglect, then s. 5 of the same may still come to the accused's rescue so that the law relating to criminal procedure in England may be applied by the court. D

[60] In *Tan Boon Hock v. PP* [1978] 1 LNS 194; [1979] 1 MLJ 236 at p. 237 the Federal Court held that: E

> Section 4 of the Criminal Procedure Code says nothing in the Code shall be construed as derogating from the powers or jurisdiction of the High Court. In matters of criminal procedure, s. 5 of the Code lays down that English law shall apply where no provision is made by the Code or by any other law. F

[61] In *PP v. Saat Hassan & Ors* [1988] 1 CLJ 80; [1988] 2 CLJ (Rep) 290 at p. 308 Mahadev Shankar J stated that:

> Section 4 of the Code states that 'nothing in this Code shall be construed as derogating from the powers or jurisdiction of the High Court.' In my view this section expressly preserved the inherent jurisdiction of the High Court to make any order necessary to give effect to other provisions under the Code or to prevent abuse of the process of any Court or otherwise to secure the needs of justice. G
>
> Section 5 of the Code now provides that where there is a *lacuna* in the law for the time being in force in Malaysia then the law relating to Criminal Procedure for the time being in force in England shall be applied so far as the same shall not conflict or be inconsistent with the Code and can be made auxiliary thereto. H

I

A The powers of the High Court are referred to in s. 25 of the Courts of Judicature Act 1964 and the High Court in the exercise of its jurisdiction has consequently got all the powers vested in it immediately prior to Malaysia Day and such other powers as may be vested in it by any written law in force within its local jurisdiction. Section 25(2) of the Judicature Act gives the Court the additional powers set out in the Schedule which B includes under Article 8 the powers to enlarge or abridge the time prescribed by any written law for doing any act or taking any proceeding although any application be not made until after the expiration of the time prescribed provided that this provision shall be without prejudice to any written law relating to limitation.

C The jurisdiction of the Court immediately prior to Malaysia Day in criminal matters were of a like nature and extent as that held and exercised in England in criminal matters by the High Court of Justice.

In every case the concern of the Court is that substantial justice may be done in the matter.

D **[62]** We observed that the following cases are instances where our courts have resorted to English law on criminal procedure:

(i) Taking a plea from a company: In *Justin Milroy Narakera v. PP* [1990] 2 CLJ 226; [1990] 2 CLJ (Rep) 181, the High Court referred to English legislation as to how a company should make a plea in criminal trials. E

(ii) Use of one-way mirror in an identification parade: In *Ong Lai Kim & Ors v. PP* [1991] 2 CLJ 1568; [1991] 3 CLJ (Rep) 376; [1991] 3 MLJ 111, Zakariah Yatim J held that since there is no express provision governing the procedure for holding an identification parade using a one-way F mirror, the English common law practice was applicable to the instant case by virtue of s. 5 of the CPC.

(iii) Person entitled to cross-examine witnesses during inquest: In *Sara Lily & Satu Lagi lwn. PP* [2004] 7 CLJ 335, the High Court invoked s. 5 and adopted the English Coroners Rules 1984, holding that the parent, child, G any personal representatives of the deceased or any other person who in the opinion of the coroner is a properly interested person, is entitled to be present and question any witness personally or through their advocate in a proceeding inquiring into a death of a person.

[63] In light of the above authorities, we are of the view that Malaysian H courts are empowered to refer to English criminal procedural law under the CPC when there is a *lacuna* in the law and when the said principles of English law do not conflict with the provisions of the CPC.

[64] A perusal of the CPC shows that it does not contain any provisions governing the court's powers to order declaratory relief. However, as we I have seen above, s. 4 preserves the "powers and jurisdiction" of the High Court which undoubtedly include the High Court's powers under s. 25 of the CJA and its inherent jurisdiction.

[65] Section 25 of the CJA states that:

> Powers of the High Court
>
> 25 (1) Without prejudice to the generality of Article 121 of the Constitution the High Court shall in the exercise of its jurisdiction have all the powers which were vested in it immediately prior to Malaysia Day and such other powers as may be vested in it by any written law in force within its local jurisdiction.
>
> (2) Without prejudice to the generality of subsection (1) the High Court shall have the additional powers set out in the Schedule:
>
> Provided that all such powers shall be exercised in accordance with any written law or rules of court relating to the same.

[66] Section 25 of the CJA gives statutory recognition to the fact that in Malaysia, the High Court, in addition to its statutory powers, also has the inherent common law powers of the High Court in England.

[67] With regard to the characteristics of inherent power, *Malaysian Civil Procedure 2021*, vol. 1, (Selangor: Sweet & Maxwell, 2021) (MCP 2021 vol. 1) at p. 1340, para. 92/4/4 also explains as follows:

> … Inherent power is regarded as the court's common law power and is a separate and distinct source of jurisdiction from the statutory powers of the court (*R Rama Chandran v. The Industrial Court of Malaysia & Anor* [1997] 1 AMR 433; [1997] 1 MLJ 145; [1997] 1 CLJ 147 at 230, FC; Jeffrey D Pinsler, *"The Inherent Powers of Court"* (1997) SJLS 1).
>
> It is a residuary and reserve source of power (*R Rama Chandran v. Industrial Court of Malaysia & Anor* (above) at 230; *Heng Joo See v. Ho Pol Ling* [1993] 3 SLR 850 at 855, HC (Singapore)). Thus it can be exercised cumulatively and concurrently with other sources of power. It is part of procedural law, not substantive law. It is invoked in relation to the process of litigation (see *Halsbury's Laws of England* (5th edn), vol 11 (2015), para 23).
>
> Its application depends on the circumstances of the case. The significance of the doctrine of inherent jurisdiction lay in its flexibility, for the court could extend it to any instance which required its intervention in the absence of precise statutory regulation, or where injustice or abuse might otherwise result (Jeffrey D Pinsler, *"The Inherent Powers of Court"* (1997) SJLS 1). It should be exercised judiciously and should not be circumscribed by rigid criteria or tests (*Wee Soon Kim Anthony v. The Law Society of Singapore* (unreported; Civil Appeal No 600018 of 2001). It must not be applied indiscriminately (*Abdul Razak Ahmad v. Majlis Bandaraya Johor Bahru* [1995] 2 MLJ 287 at 293, HC).

[68] Reference is made to para. 1 of the Schedule to the CJA which expressly provides that the High Court has:

A Power to issue to any person or authority directions, orders or writs, including writs of the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, or any others, for the enforcement of the rights conferred by Part II of the Constitution, or any of them, or for any purpose.

B **The Court's Jurisdiction To Make A Declaratory Order**

[69] We turn now to the question of whether the Criminal High Court has the jurisdiction to make a declaratory order.

[70] Declaratory order or a declaratory judgment is defined as follows:

C (i) in *Halsbury's Laws of England*, 5th edn, vol. 61A, 2018, it attempted to define declaratory judgment in the context of judicial review at p. 275, para. 107 as follows:

> … A declaratory judgment is a judicial decision which involves the declaration of the law in relation to a particular matter, such as that
D a decision of a public body is *ultra vires,* or a declaration of the rights of a party without any reference to their enforcement.

(ii) in *Woolf, H, et al, De Smith's Judicial Review*, 8th edn, (London: Sweet & Maxwell, 2018), at p. 1003, para. 18-037, it was opined that:

> A declaration is a formal statement by the court pronouncing upon
E the existence or non-existence of a legal state of affairs. It declares what the legal position is and what are the rights of the parties. A declaration is to be contrasted with an executory, in other words, coercive judgment which can be enforced by the courts. In the case of an executory judgment, the courts determine the respective
F rights of the parties and then order the defendant to act in a certain way, for example, to pay damages or to refrain from interfering with the claimant's rights. If the order is disregarded, it can be enforced by official action, usually by levying execution against the defendant's property or by imprisoning him for contempt of court. A declaration, on the other hand, pronounces
G upon the existence of a legal relationship but does not contain any order which can be enforced against the defendant. The court may, for example, declare that the claimant is a British subject or that a notice served upon him by a public authority is invalid and of no effect. The declaration pronounces on what is the legal position.

H (iii) in *Pengarah Tanah Dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1978] 1 LNS 143; [1979] 1 MLJ 135 (FC), where Raja Azlan Shah Ag CJ (Malaya) held that:

> In the first place it must be made clear that the existence of a statutory remedy is no bar to an action for a declaration. This case
I falls within the general principle that the jurisdiction of the High Court is not to be taken away without express words; and this

> applies to an action for a declaration: see *Pyx Granite* (*ante*). Secondly, all that a declaration does is to declare the rights of the parties, and the effect of making a declaration would be that it would give the Land Executive Committee an opportunity of having second thoughts at the problem. Lastly, it is not the province of the courts to review the decisions of government departments merely on their merits. Government by judges would be regarded as an usurpation. …

(iv) the above position was supported by the case in *Kamil Azman Abdul Razak & Ors v. Amanah Raya Bhd & Ors* [2019] 6 CLJ 419; [2019] 4 MLJ 726 (FC), where Rohana Yusuf FCJ (as Her Ladyship then was) held that:

> [45] Responding to the submissions, learned counsel for the respondents controverted the basic premise of the case of the applicants that the order of the High Court in releasing ARD from cl 9 of the consent judgment amounts to a variation or a setting aside of the consent judgment, or part of it. Learned respondents' counsel elucidated the point that the prayer of the respondents in its counterclaim merely sought for a declaration by the court for ARD to be released of its obligation to enter the JV agreement but never seeking for that relevant clause to be set aside. The difference being that, a declaratory order merely pronounces the legal state of affairs. This differs from a coercive judgment. A coercive judgment is enforceable by the court but not a declaratory order.
>
> [46] Citing in support of the above proposition is the decision in *Pengarah Tanah Dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135 where it was observed that all a declaratory order does is to declare the rights of parties. The distinction is well explained by Zamir and Woolf in *The Declaratory Judgment* (Sweet & Maxwell, 2011). In *Asia Pacific Parcel Tankers Pte Ltd v. The Owners of the Ship or Vessel 'Normar Splendour'* [1999] 6 MLJ 652, this legal position was reiterated. Declaratory judgment is also discretionary in nature as specified under s. 41 of the Specific Relief Act 1950, and as expounded in *Tan Sri Haji Othman Saat v. Mohamed bin Ismail* [1982] 2 MLJ 177.

[71] Further, in *YAB Dato' Dr Zambry Abd Kadir & Ors v. YB Sivakumar Varatharaju Naidu; Attorney-General Malaysia (Intervener)* [2009] 4 CLJ 253, the applicants filed an originating summons in the High Court seeking, *inter alia*, a declaration that the respondent's (the Speaker of the Perak Legislative Assembly) decision suspending and prohibiting the applicants from attending sessions of the State Legislative Assembly was against the laws of the Constitution of Perak and was accordingly null and void. The Federal Court observed on p. 278 that:

A

> Lee Hun Hoe CJ (Borneo) in *Datuk Syed Kechik bin Syed Mohamed v. Government of Malaysia & Anor* [1979] 2 MLJ 101 said: 'The prevailing view seems to be that the court's jurisdiction to make a declaratory order is unlimited, subject only to its own discretion.'

[72] Later on, at p. 287, the Federal Court also made the following
B pronouncements:

> [21] However, whatever restriction there may be on the use of O. 15 r. 16 it will not apply where a person seeks to assert, *inter alia,* his right to a legal status. This is statutorily recognised in the form of s. 41 which reads as follows:
>
> C
> > Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to the character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in that suit ask for any further relief:
>
> D
> > Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration or title, omits to do so.
>
> In explaining the words "... legal character ..." as appearing in
> E s. 41 the *Indian Contract and Specific Relief Act* by Polloct (*sic*) & Mulla 10th edn, says at p 1065:
>
> > Legal character or any right to any property are species of the same genus, *viz* 'legal status'. 'Legal character' however does not appear to be a phrase common to jurisprudence nor does it appear to be used in statutes except s. 42 of Specific Relief Act (s. 34 of the new
> F Act) and s. 41 of the Indian Evidence Act. But what was intended to be meant was 'legal status'. A man's 'legal character' is the same thing as his status which is constituted by the attributes the law ascribes to him in his individual and personal capacity.
>
> *Sarkar's Specific Relief Act* 13th edn, says at p 316:
>
> G
> > Legal character means the same thing as status (*Kali Kishen v. Golam*, 13 Cal 3) and includes characteristics which the law attaches to a man in his personal and individual capacity, *eg* divorce, marriage, adoption, legitimacy (Next *Jehan v. Eugene*, AIR [1942] Cal 35).
>
> H
> > It has, however, been held that the words 'legal character' are wide enough to include the right of franchise and the right of being elected a municipal councillor (*Satnarain v. Hanumanprasad* AIR [1946] Lah 85), or the right to remain in service against an illegal order of dismissal (*State of Bihar v. Abdul Majid* [1954] SCR 786.

I

[22] In *The Attorney General of Hong Kong v. Zauyah Wan Chik & 3 Ors & Another Appeal* [1995] 3 CLJ 35, Gopal Sri Ram JCA (as he then was) in commenting on the jurisdiction of the court to grant declaratory relief under s. 41 said at pp 49-50: A

> Now, the jurisdiction of a Malaysian court to grant declaratory relief springs from two sources. First there is the statutory basis to be found in s. 41 of the Specific Relief Act 1950 which reads as follows: B
>
> > Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to the character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in that suit ask for any further relief: C
>
> Provided that no court shall make any such a declaration where the plaintiff, being able to seek further relief than a mere declaration or title, omits to do so. D
>
> …
>
> The alternative basis for the grant of declaratory relief – a jurisdiction of great antiquity – is the inherent jurisdiction of the court: *Kuluwante (An infant) v. Government of Malaysia & Anor* [1978] 1 MLJ 92. It has long been recognised by Indian courts administering their Specific Relief Act 1877 (later revised and re-enacted in 1963) that s. 42 of that enactment, which is identical to s. 41 of our statute is not a complete code upon the subject of declaratory decrees. E
>
> In *Supreme General Films Exchange Ltd v. Brijnath Singhji* AIR [1975] SC 1810, Beg J explained the scope of the declaratory jurisdiction in these words: F
>
> > *Kishori Lal*'s case AIR [1952] Punj 387 was cited to show that declaratory decrees falling outside s. 42 of the Specific Relief Act are not permissible because s. 42, Specific Relief Act is exhaustive on this subject. This view must be held to have been rejected by this court when it declared in *Vemareddi Ramaraghava Reddy v. Konduru Seshu Reddy* [1966] Supp SCR 270 at p 277; AIR [1967] SC 436 at p 440: G
> >
> > In our opinion, s. 42 of the Specific Relief Act is not exhaustive of the cases in which a declaratory decree may be made and the courts have power to grant such a decree independently of the requirements of the section. It follows, therefore, in the present case that the suit of the plaintiff for a declaration that the compromise decree is not binding on the deity is maintainable as falling outside the purview of s. 42 of the Specific Relief Act. H I

The result is that s. 42 merely gives statutory recognition to a well-recognised type of declaratory relief and subjects it to a limitation, but it cannot be deemed to exhaust every kind of declaratory relief or to circumscribe the jurisdiction of courts to give declarations of right in appropriate cases falling outside s. 42.

We think that the circumstances in which a declaratory decree under s. 42 should be awarded is a matter of discretion depending upon the facts of each case. No doubt a complete stranger whose interest is not affected by another's legal character or who has no interest in another's property could not get a declaration under s. 42, Specific Relief Act with reference to the legal character or the property involved.

The Federal Court in *Tan Sri Haji Othman Saat v. Mohamed bin Ismail* [1982] 1 LNS 2; [1982] 2 MLJ 177 cited and applied the decision of the Indian Supreme Court in *Supreme General Films Exchange Ltd* and in other Indian cases. The relevant passage reads as follows (at p 178):

> It will be necessary at the outset to consider the scope of the power to grant declaratory orders and judgments. Chapter VI of the Specific Relief Act 1950 deals with declaratory decrees and s. 41 thereof provides for the discretion of the court as to declarations of status or right. Section 41 of the Specific Relief Act was textually adopted *totidem verbis* from s. 42 of the Indian Specific Relief Act and Civil Procedure Code, s. 41 of the Specific Relief Act 1877 (now s. 34 of the Indian Specific Relief Act 1963), and on an application of the law enunciated by the Privy Council and the Supreme Court of India in relation to the equivalent provisions in the Indian Specific Relief Act and Civil Procedure Code, s. 41 of the Specific Relief Act gives statutory recognition to a well-recognised type of declaratory relief and subjects it to a limitation but it cannot be deemed to exhaust every kind of declaratory relief or to circumscribe the jurisdiction of the courts to give declarations of right in appropriate cases falling outside it. The court has power to grant such a decree independently of the requirements of the section, and such a declaration outside the purview of this statutory enactment will be governed by the general provisions of O. 15 r. 16 of the Rules of the High Court 1980 which will then apply (*Supreme General Films Exchange Ltd v. His Highness Maharaja Sir Brijnath Singhji Deo of Maihar & Ors*, following *Vemareddi Ramaraghava Reddy & Ors v. Konduru Seshu Reddy & Ors* relying on the decisions of the Privy Council in *Fischer v. Secretary of State for India in Council* [1899] 26 IA 16 and *Partab Singh v. Bhabuti Singh* [1913] 40 IA 182).

> While I cannot possibly agree to the reference to O. 15 r. 16 as providing a jurisdictional basis (see *Government of Malaysia v. Lim Kit Siang* [1988] 1 CLJ 63 (Rep); [1988] 1 CLJ 219; [1998] 2 MLJ 12), I respectfully agree with the proposition that s. 42 is not exhaustive and does not constitute the sole jurisdictional basis for the grant of declaratory relief.

[73] In the light of the above authorities, we are of the view that the court's jurisdiction to grant declaratory relief is not solely derived from the Specific Relief Act 1950 but also emanates from its inherent jurisdiction.

United Kingdom

[74] In *Hanson v. Radcliffe* UDC [1922] 2 Ch 490 at p. 507; [1922] All ER Rep 160 at p. 162 Lord Sterndale MR stated that:

> In my opinion … the power of the Court to make a declaration, where it is a question of defining the rights of two parties, is almost unlimited; I might say only limited by its own discretion. The discretion should of course be exercised judicially, but it seems to me that the discretion is very wide.

[75] Lord Sterndale MR's views were cited with approval later on by the Privy Council in *Ikebife Ibeneweka and others Applicants; and Peter Egbuna and Another Respondents* [1964] 1 WLR 219. Viscount Radcliffe delivering the opinion of the Board said at pp. 224 to 225 that:

> Much has been said in various reported judgments about the nature of the power thus vested in the court, but none of these observations detracts from the two primary considerations, that the power to make declarations is conferred, surely not by accident, in wide and general terms, and that what is conferred is a discretion to be exercised according to the facts of each individual case.
>
> The general theme of judicial observations has been to the effect that declarations are not lightly to be granted. The power should be exercised "sparingly," with "great care and jealousy," with "extreme caution," with "the utmost caution." These are indeed counsels of moderation, even though as, Lord Dunedin once observed, such expressions afford little guidance for particular cases. Nevertheless, anxious warnings of this character appear to their Lordships to be not so much enunciations of legal principle as administrative cautions issued by eminent and prudent judges to their, possibly more reckless, successors. After all, it is doubtful if there is more of principle involved than the undoubted truth that the power to grant a declaration should be exercised with a proper sense of responsibility and a full realisation that judicial pronouncements ought not to be issued unless there are circumstances that call for their making. Beyond that there is no legal restriction on the award of a declaration.

[76] In *R (Rusbridger) v. Attorney-General* [2003] UKHL 38; (2003) 3 All ER 784, the House of Lords refused to grant declaratory relief in connection with the criminal process. It however recognised that there will be "exceptional cases" to which declaratory relief might be ordered, without specifying what those exceptional cases are: see paras. [16], [32] and [56].

[77] What then are the limits of the court's declaratory jurisdiction? There is an academic opinion that it is to be defined in a negative way:

> The scope of the declaratory jurisdiction can be defined only in a negative way, that is, by stating the cases in which the courts have no power to grant declaratory relief.
>
> The declaratory jurisdiction has sometimes been represented as virtually unlimited. Thus, in a recent case Denning L.J. (as he then was) said: "I know of no limit to the power of the court to grant a declaration except such limit as it may in its discretion impose upon itself". Such *dicta* serve to emphasise the vast, and as yet unexhausted, potentialities of declaratory relief. They should not, however, be taken to mean that the courts can make declarations on any matter whatever. …
>
> The declaratory jurisdiction is restricted in two ways. First, the courts may not grant declarations on matters outside their general jurisdiction. This limitation seems to be in the nature of any inherent power. Inherent powers – and these include also the power to make declarations of right – are to facilitate and provide better relief in the adjudication of cases which are properly brought before the judges, but not to extend the established jurisdiction of the courts. …
>
> Secondly, within these limits, the jurisdiction of the courts is further restricted by numerous statutory provisions ousting the declaratory power in matters which otherwise would have been subject thereto. Such are, for example, provisions prescribing some special procedure to be followed by the High Court or giving exclusive jurisdiction to another tribunal in specified matters.
>
> The declaratory jurisdiction may, accordingly, be described as follows: within the limits of the general jurisdiction of the courts, and subject to privative statutory provisions, the courts may, in their discretion, make declarations upon any matter whatsoever.

India

[78] In India, declaratory decrees are governed by *inter alia* s. 34 of the Specific Relief Act 1963. Section 34 of Specific Relief Act reads:

> 34. Discretion of court as to declaration of status or right.
>
> Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:

Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

[79] Section 34 of the Specific Relief Act 1963 is in *pari materia* with our s. 41. Section 34 of the Specific Relief Act 1963 outlines certain conditions which are to be fulfilled by the plaintiff. In order to obtain the relief of declaration, the plaintiff must establish that he is entitled to a legal character, or to a right as to property. The plaintiff must also establish that the defendant has denied or is interested to deny his title to such character or right and he has sought all reliefs in the suit.

[80] In *General Films Exchange Ltd v. His Highness Maharaja Sir Brijnath Singhji Deo of Maihar & Ors* [1975] 2 SCC 530, the scope of the provision and whether the plaintiff has the legal character and right to claim the declaration under the Specific Relief Act was discussed. The court held that the provision gives a statutory recognition to such relief, subject to limitation. However, it does not deem to exhaust every kind of declaratory relief falling outside the ambit of the provision. The circumstances under this section are a matter of discretion of the courts depending upon the facts and circumstances of the case.

[81] Similarly, the Indian Supreme Court in *Ashok Kumar Srivastav v. National Land Insurance Company Ltd JT* [1998] 3 SC 519, held:

> [18] Chapter II contains a fasciculus of rules relating to specific performance of contracts. Sec. 14 falls within that chapter and it points to contracts which are not specifically enforceable. Powers of the court to grant declaratory reliefs are adumbrated in Sec. 34 of the Act which falls under Chapter VI of the Act. It is well to remember that even the wide language contained in Sec. 34 did not exhaust the powers of the court to grant declaratory reliefs. In *Veruareddi Ramaraghava Reddy v. Konduru Seshu Reddy and others Veruareddi Ramaraghava Reddy v. Konduru Seshu Reddy and others Veruareddi Ramaraghava Reddy v. Konduru Seshu Reddy and others*, 1966 S.C.R. (Supp.) 270 and in *M/s. Supreme General Films Exchange Ltd. v. His Highness Maharaja Sir Brijnath Singhji Deo of Maihar and others M/s.Supreme General Films Exchange Ltd. v. His Highness Maharaja Sir Brijnath Singhji Deo of Maihar and others M/s. Supreme General Films Exchange Ltd. v. His Highness Maharaja Sir Brijnath Singhji Deo of Maihar and others* (1975)2 S.C.C. 530 this Court while interpreting the corresponding provision in the preceding enactment of 1877 (Sec. 42) has observed that Sec. 42 merely gives statutory recognition to a well-recognised type of declaratory relief and subjects it to a limitation, but, it cannot be deemed to exhaust every kind of declaratory relief or to circumscribe the jurisdiction of courts to give declarations of right in appropriate cases falling outside Sec. 42.
>
> [19] The position remains the same under the present Act also. Hence the mere fact that a suit which is not maintainable under Sec. 14 of the Act is not to persist with its disability of non-admission to civil courts even

outside the contours of Chapter II of the Act. Sec. 34 is enough to open the corridors of civil Courts to admit suits filed for a variety of declaratory reliefs.

[82] Although s. 34 of the Specific Relief Act 1963 (then s. 42) is generally considered as non-exhaustive, an applicant for declaratory relief must establish that he is entitled to a legal character or a right to property in order to claim for a declaratory relief. In *Krishnaveni Ammal and another v. MD Soundararajan (deceased) and others* (1944) 2 MLJ 231, at p. 233, the High Court of Judicature at Madras held that:

> It is true, as laid down in the various decisions to which I have referred, that the general view is that section 42 of the Specific Relief Act (now section 34 of the Specific Relief Act 1963) is not exhaustive, but there is no authority for the proposition that a suit for a declaratory decree will lie when the plaintiff is neither entitled to any legal character nor to any right in the suit property. To return to the judgment of their Lordships, *Sheoprasan Singh v. Ramnandan Prasad Narayan Singh* (1933) 65 MLJ 186: ILR 56 Mad. 749, their Lordships repeat the warning given in *Sree Narain Mitter v. Krishan Soondary Dassee* (1916) 31 MLJ 77: LR 43 IA 91: ILR 43 Cal. 694 (PC), where it was stated:
>
> (i) There is so much more danger in India than here of harassing and vexatious litigation that the Courts in India ought to be most careful that mere declaratory suits be not converted into a new and mischievous source of litigation.
>
> (ii) I consider that this suit should have been dismissed for exactly the same reason as given by their Lordships in *Sheoparsan Singh v. Ramnandan Prasad Narayan Singh* (1933) 65 MLJ 186: ILR 56 Mad. 749 to which reference has already been made, namely, because the plaintiff in the appeals before us is clothed with neither a legal character nor title to the suit property I will conclude by adding that their Lordships after noticing the facts in relation to the plaintiff's legal position did not even discuss whether the suit would *lie aliundi.*

[83] An applicant for declaratory relief must establish that there are some legal rights that are in issue, which warrant the court to grant a declaration on the matter. In *S Selvagomathi v. Chancellor/Governor of Tamil Nadu Madurai Kamaraj University, Raj Bhavan, Chennai – 600 022 and Others* (2018) 4 MLJ 634, the Madurai Bench of Madras High Court held that:

> (i) The writ petitioner has filed this writ petition claiming to be in public interest. The credentials of the writ petitioner have been set out in Paragraph No. 5 of the affidavit filed in support of the writ petition. The standing of the writ petitioner is not in doubt. But, that by itself will not make the writ petition maintainable. An applicant for declaratory relief must show that some legal right is in issue. Since the present writ petition has been claimed to have been filed in public interest, it is not necessary that the writ petitioner's rights should be shown as having been infringed. But then, the writ

petitioner is bound to show the infringement of the legal right of a class of persons, who are by themselves unable to access this Court directly and whose cause the writ petition is claiming to espouse.

[84] The above authorities show that s. 34 of the Indian Specific Relief Act does not exhaust every kind of declaratory relief or to circumscribe the jurisdiction of courts to give declarations of right in appropriate cases falling outside the said section.

32. However, it appears that in India, the power to grant declaratory reliefs lies with the civil court only, as expressly recognised by the High Court of Judicature at Madras in the case of *The Victoria Edward Hall, represented by its Secretary, Dr. I. Ismail, Madurai Versus M.Samraj and others* (2001) 3 MLJ 39.

6. … There is no dispute that newly admitted members cannot vote in the election before approval was given by the Registrar of Societies, Madurai South. This aspect of the matter has also to be considered and decided by the trial Court in the light of the records to be submitted on both sides. It is in view of the said petition, the 1st respondent as plaintiff has sought for declaration that the voters list of the year 2000-2001 is incorrect and invalid and that the election held on 13.7.2000 to elect the present Secretary and Committee members of the society for 2000-2001 is null and void. There can be no doubt, declaratory relief can be granted only by competent Civil Court and not by any other forum. But it is relevant to point out that the Registrar of Societies will have power under the Act and Rules to enquire into the correctness and validity of the voters l1st and also to find out as to whether the election of Secretary and Members of the Executive Committee of the revision petitioner society was in accordance with the bye laws of the society and also the Act and Rules. Therefore, it will be a concurrent jurisdiction to the Civil Court as well as to the authorities concerned under the Act and the Rules. A relief of permanent injunction restraining the elect body can be granted by a Civil Court having jurisdiction alone and not by any other authority empowered under the Act and the Rules. This is the special power conferred on the Civil Court and the 1st respondent herein has come forward with this suit to exercise such special power vested with the competent Civil Court in this matter. Though the authority under the Act and the Rules can take over administration of the revision petitioner society, they cannot appoint a receiver as done by the trial Court in this matter already.

Singapore

[85] In Singapore, s. 18 of the Supreme Court of Judicature Act ('SCJA') and para. 14 of First Schedule are relevant to our discussion. Section 18 of the SCJA states that:

A 18 (1) The General Division shall have such powers as are vested in it by any written law for the time being in force in Singapore.

(2) Without prejudice to the generality of subsection (1), the General Division shall have the powers set out in the First Schedule.

B (3) The powers referred to in subsection (2) shall be exercised in accordance with any written law, Rules of Court or Family Justice Rules relating to them.

[86] Paragraph 14 of the First Schedule states that:

C 14. Power to grant all reliefs and remedies at law and in equity, including damages in addition to, or in substitution for, an injunction or specific performance.

[87] The court also has jurisdiction to make binding declarations which is also one of its discretionary powers pursuant to O. 15 r. 16 of the Singaporean Rules of Court which states:

D No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed.

[88] In the case of *Wing Joo Loong Ginseng Hong (Singapore) Co Pte Ltd* E *v. Qinghai Xinyuan Foreign Trade Co Ltd* [2009] 2 SLR(R) 814, the Court of Appeal ruled that the civil court has the jurisdiction to grant a declaration pertaining to criminal proceedings by referring to the judgment of Gibbs ACJ in *Sankey v. Whitlam* (1978) 142 CLR 1.

F 176 The court has the power to grant declarations upon any matter as long as, in doing so, it does not exceed its general jurisdiction or contravene any express statutory provision (see Lord Woolf & Jeremy Woolf, *The Declaratory Judgment* (Sweet & Maxwell, 3rd Ed, 2002) at para 3.005).

…

G (2) The exercise of the power

180 It appears to be well-established law that a civil court (as defined at sub-para (b) of [164] above) has the jurisdiction to grant a declaration even if it pertains to criminal proceedings. As Gibbs ACJ stated in *Sankey v. Whitlam* (1978) 142 CLR 1 ("*Sankey*"), "[i]t is H clear enough that the power of the court is not excluded (merely) because the matter as to which a declaration is sought may fall for decision in criminal proceedings" (at 20).

181 It appears to be equally well-established law that a civil court will, in normal circumstances, be slow to grant a declaration relating to I the criminal consequences of conduct (see, eg, the arguments of Mr Anthony Lester QC and Mr Pushpinder Saini, acting as *amici*

curiae, in *Airedale NHS Trust v. Bland* [1993] AC 789 at 854, citing the House of Lords' decision in *Imperial Tobacco Ltd v. Attorney-General* [1981] AC 718 ("*Imperial Tobacco*") at 718, 741-742, 746 and 750-752). The rule is not inflexible, however, and the court may grant declaratory relief relating to the criminal consequences of conduct in appropriate cases. The circumstances in which it will be appropriate for a civil court to do so, however, are likely to be very rare and exceptional (see P W Young, *Declaratory Orders* (Butterworths, 2nd Ed, 1984) at p 152); for instance, it must be shown that the criminal proceedings have not been properly brought or are vexatious or constitute an abuse of process in that the facts alleged do not in law prove the offence charged (see the arguments of Mr Christopher Brougham QC in *Smith v. Braintree District Council* [1990] 2 AC 215 at 218, citing *Imperial Tobacco* at, *inter alia,* 750-752).

…

192 From the analysis above, it appears to be well-established law that while a civil court has the jurisdiction to grant a declaration as to the criminal consequences of conduct, it will normally be slow to do so unless the circumstances are exceptional. Such exceptional circumstances would arise, *inter alia*, where the criminal proceedings have not been properly brought or are vexatious or amount to an abuse of process in that the facts alleged by the Prosecution do not in law prove the offence charged. As *Singapore Civil Procedure 2007* (G P Selvam chief ed) (Sweet & Maxwell Asia, 2007) states (at para 15/16/4):

> A declaration ought not to be granted by the judge in a civil court to a defendant in criminal proceedings, which are properly instituted against him and are not vexatious or an abuse of the process of the court, on the ground that the facts alleged by the prosecution do not in law prove the offence charged, because to make such a declaration would be to usurp the function of the criminal court without binding it and would thus inevitably prejudice the criminal trial …

[89] In *Sun Travels & Tours Pvt Ltd v. Hilton International Manage (Maldives) Pvt Ltd* [2019] SGCA 1, the Singapore Court of Appeal laid down the preconditions for the grant of declaratory relief by referring to the case of *Salijah bte Ab Latef v. Mohd Irwan bin Abdullah Teo* [1996] 2 SLR(R) 80 ("*Salijah*") (at para. [50]) as follows:

(i) the existence of jurisdiction and power;

(ii) that discretion ought to be exercised in favour of the application;

(iii) the plaintiff has *locus standi*; and

(iv) that the defendant is a necessary defendant.

[90] The Singapore Court of Appeal in *Sun Travels & Tours Pvt Ltd* (*supra*) held that:

> 133 In our judgment, this wide-ranging power to grant declaratory relief is derived from s. 18 of the SCJA, read with para 14 of the First Schedule to the SCJA; both provisions, read together, confer on the court the "[p]ower to grant all relief and remedies at law and in equity". In addition, O. 15 r. 16 of the Rules of Court (Cap 322, r. 5, 2014 Rev Ed) clarifies that it is possible to seek only a mere declaratory judgment or order from the court. The power to grant declaratory relief applies in all cases, including proceedings in the context of arbitration. [58]; *Tan Eng Hong v. AG* [2012] 4 SLR 476 ("*Tan Eng Hong*") at [131], [132] and [137]). This court in *Tan Eng Hong* explained that "[w]here the circumstances of a case are such that a declaration will be of value to the parties … the court may proceed to hear the case and grant declaratory relief even though the facts on which the action is based are theoretical" (at [143]).

[91] It is therefore clear that in Singapore, s. 18 of the SCJA, read together with para. 14 of the First Schedule to the SCJA, enables the court to grant all relief and remedies at law and in equity and that the power to grant declaratory relief extends to all proceedings, including proceedings in the context of arbitration.

[92] Based on the foregoing analysis, it can be concluded as follows:

(i) it must be emphasised that s. 5 of the CPC is in relation to matters of criminal procedure for which no special provision has been made by the CPC or by any other law for the time being in force, only then the law relating to criminal procedure for the time being in force in England shall be applicable;

(ii) in general, the Malaysian courts are empowered to refer to English criminal procedural law under the CPC when there is a *lacuna* in the law and when the said principles of English law do not conflict with the provisions of the CPC;

(iii) the CPC does not contain any provisions governing the court's powers to order declaratory relief. However, s. 4 of the CPC preserves the "powers and jurisdiction" of the High Court which undoubtedly include the High Court's powers under s. 25 of the CJA and its inherent jurisdiction;

(iv) the court's jurisdiction to grant declaratory relief is not solely derived from the Specific Relief Act 1950 but also emanates from its inherent jurisdiction;

(v) in UK, in *R (Rusbridger)* (*supra*), the House of Lords refused to grant declaratory relief in connection with the criminal process. It however recognised that there will be "exceptional cases" to which declaratory relief might be ordered, without specifying what those exceptional cases are;

(vi) while in Singapore, in the case of *Wing Joo Loong Ginseng Hong* (*supra*) by referring to the judgment in *Sankey* (*supra*), the Court of Appeal ruled that the civil court has the jurisdiction to grant a declaration pertaining to criminal proceedings. While a civil court has the jurisdiction to grant a declaration as to the criminal consequences of conduct, it will normally be slow to do so unless the circumstances are exceptional.

[93] Reverting to the present case, learned counsel for the applicant has not been able to bring to our attention the decision of any court in which the criminal court has granted declaratory relief in criminal proceedings.

[94] The order of the Federal Court dated 7 August 2019 in *Dato' Sri Mohd Najib Tun Hj Abdul Razak v. PP* (Rayuan Jenayah No: 05(L)-127-05-2019 (W)), in our view did not support the argument advanced by the applicant as in that case, the Federal Court did not grant the declaratory reliefs sought by the appellant.

[95] In *Dato' Sri Mohd Najib Hj Abdul Razak v. PP* [2019] 1 LNS 1837; [2019] MLJU 529, the appellant filed notice of motion to disqualify GSR from continuing to act as a prosecutor in the following criminal cases brought against him:

(i) WA-45-7-2018 and WA-45-8-2018 ('the 1MDB Case');

(ii) WA-45-10-2018 ('the MOF case'); and

(iii) WA-61R-26-2018 ('the PAC case').

[96] Essentially the main reliefs sought by the appellant are, *inter alia*, for:

(i) an order that the respondent, within three days from the date of this order, produce a copy of the letter of appointment executed by the respondent in relation to the appointment of GSR as a Senior DPP purportedly under s. 376(3) of the CPC; and

(ii) an order that GSR be disqualified from continuing to act as a Senior DPP and/or to appear on behalf of the Public Prosecutor in the 1MDB case, the MOF case and the PAC case.

[97] The High Court then dismissed the application for the disqualification of GSR. The decision of the High Court was affirmed by the Court of Appeal. The applicants appealed to the Federal Court. On 7 August 2019, the Federal Court affirmed the decision of the Court of Appeal on the issue of disqualification. However, the Federal Court allowed the appeal in part and ordered the Public Prosecutor to produce a copy of the letter of appointment and a copy to be given to the counsels of the applicants. The same was produced on 9 August 2019.

[98] It is important to note that the relief for declaration was not granted by the Federal Court. With respect, it appears that learned counsel for the applicant had misappreciated the scope of the order issued by the Federal Court. Therefore, the case of *Dato' Sri Mohd Najib Hj Abdul Razak v. PP* (Rayuan Jenayah No: 05(L)-127-05-2019 (W)) is of no assistance to the applicant.

[99] This is further supported by the Federal Court's decision in *Sodomy II* appeals where Dato' Seri Anwar Ibrahim mounted several challenges to the appointment of Tan Sri Shafee as a Deputy Public Prosecutor under s. 376(3) of the CPC. On 14 October 2014, the Federal Court dismissed the third disqualification application and pronounced that Dato' Seri Anwar Ibrahim ought to have filed an application for judicial review to question AG's decision to appoint Tan Sri Shafee as Deputy Public Prosecutor (see article in The Edge). Unfortunately, the decision of the Federal Court is not reported in any of the law journals (see also this court decision in *Dato' Sri Mohd Najib Tun Hj Abdul Razak v. Peguam Negara & Ors And Another Appeal* [2020] 2 CLJ 73; [2020] 3 MLJ 114).

[100] In the light of the above authorities, we are of the view that the declaratory reliefs have always been treaded as civil in its essence. Criminal court does not have similar powers as the civil court for it to be deemed as a civil court for the purpose of entertaining a declaration. It must be emphasised that criminal justice system must avoid becoming involved in civil matters.

[101] In fact, we note that there is nothing in s. 22(1)(a) and (b) of the CJA that could be construed to confer jurisdiction on the High Court to grant declaratory relief in criminal application. In our view, in the absence of jurisdiction conferred on the criminal jurisdiction of the High Court to deal with declaratory reliefs, the criminal High Court has no power to grant the reliefs sought by the applicant in both the applications. Considering the fact that the main and only relief asked for is the declaratory relief, therefore, the powers lie in the competent civil courts.

[102] A perusal of the provisions of the CPC, which lays down the procedure and powers of the criminal court, clearly reveals that the criminal court has no power to grant declaratory relief.

[103] After giving our utmost and anxious consideration to this issue, in principle, we accept the approach of counsel for the respondent. We find ourselves in agreement with the judgment of this court in *Uthayakumar Ponnusamy* (*supra*). This court in *Uthayakumar Ponnusamy* (*supra*) dealt with a similar issue as this present case. The facts of that case are as follows:

(i) The applicant filed a miscellaneous criminal application *vide* a notice of motion ('the application') in the High Court, seeking for several reliefs against respondents. The application was resisted by the prosecution who raised preliminary objections that:

(a) the reliefs or the declaration prayed for by the applicant were not within the jurisdiction of the criminal court; and

(b) there was no intitulement in the application.

(ii) In response, the applicant submitted that the application ought not to be dismissed summarily on the preliminary objections without a trial because:

(a) the application was made pursuant to the inherent jurisdiction of the court, in particular O. 92 r. 4 of the Rules of Court 2012 ('the ROC');

(b) the application was the first of its kind and since the matter involved serious issues of torture, cruel, inhumane and degrading treatment of the prisoners, the applicant should be given his day in court;

(c) the application was correctly filed in the criminal court as it was filed in consequence of his imprisonment for a conviction under sub-s. 4(1) of the Sedition Act 1948;

(d) the court had the judicial powers to deal with his application for declaration; and

(e) the absence of the intitulement was a minor irregularity which could be cured.

(iii) The learned Judicial Commissioner ('the JC') found that the High Court had no power to grant the reliefs sought by the applicant. Accordingly, the preliminary objection was upheld and the application was consequently dismissed.

(iv) Aggrieved, the applicant filed an appeal to the Court of Appeal and subsequently, the applicant's appeal was dismissed and the learned JC's decision was affirmed.

[104] Her Ladyship Tengku Maimun Tuan Mat JCA (now CJ) who delivered the decision stated at p. 307 (CLJ); p. 245 (MLJ):

> [17] Further, it must be kept in mind that the application was filed as a miscellaneous criminal application and that the law governing criminal procedure is the CPC. As such, the applicant must conform to the provisions of the CPC in making the application, that is to say, the reliefs prayed for must fall within the matters allowed under the CPC. However, we found nothing in the CPC to support the application for the above reliefs.
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> [18] At this juncture, it is pertinent to highlight that the applicant was seeking for the reliefs of *mandamus* and declaration which reliefs are provided for under the Specific Relief Act 1950 (SRA). SRA pertains essentially to reliefs and remedies for civil action. And insofar as civil action is concerned, the definition in section 3 of the CJA reads:

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> a civil proceeding commenced by writ or in such other manner as is prescribed by rules of court, but does not include a criminal proceeding;

while sub-s. 21(1) of the GPA provides that:

> Civil proceedings by or against the Federal Government shall be instituted by or against, as the case may be, the Government of Malaysia.

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[105] In so far as the applicants had chosen to bring criminal proceedings in the High Court by way of their criminal motion, they could not then say that those criminal proceedings were, in fact, in the nature of civil proceedings. Litigants should not be allowed the luxury of "switching" their cases between the criminal and civil realms with complete impunity. To allow parties to successfully mount such arguments would encourage future resort to unorthodox and objectionable manoeuvres in the hope of circumventing onerous procedural requirements. (see *Ng Chye Huey And Another v. PP* [2007] SGCA 3).

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[106] In *Gouriet v. Union of Post Office Workers & Ors* [1977] 3 All ER 70 which was referred to by the Supreme Court in *Government of Malaysia v. Lim Kit Siang* (*supra*), the House of Lords was confronted with a question of whether the enforcement of a criminal law can be enforced by a civil court. Lord Diplock's view, in his judgment, is of great relevance in the present case wherein he reminded the House of Lords that:

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> In *Gouriet*'s case, the House of Lords was confronted with a similar question. The House refused to allow the enforcement of criminal law by a civil court. Lord Diplock reminded the House of the importance of keeping a difference "between private law and public law" meaning, in the context of that case, civil law and criminal law. In the words of Lord Diplock, "it is the failure to recognise this distinction that has … led to some confusion and an unaccustomed degree of rhetoric in this case". I accept this approach in view of the separation of the system of criminal justice from that of the civil justice system. It is unacceptable that criminal law should be enforced by means of civil proceedings for a declaration when the court's power to grant that remedy is only at the discretion of the court. Jurisdiction of a criminal court is fixed and certain. The standard of proof in a criminal case is different from that required in a civil case and moreover the Attorney-General is the guardian of public interest and as the Public Prosecutor, he, not the court, is in control of all prosecutions. How can a prosecution of this nature be done behind his back? These are some of the most serious objections to the exercise by a civil court of its discretionary power relating to declaratory and injunctive remedies. Our system requires the public to trust the impartiality and fair-mindedness of the Attorney-General. If he fails in his duty to exhibit this sense of fairness and to protect public interest of which he is the guardian, the matter can be raised in Parliament or elsewhere.

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[107] Therefore, it cannot be said that the criminal court can be equated with the civil court for the purpose of exercising powers relating to grant of declaration. As the subject matter of the declaration is civil in nature, the applicant ought to have moved the civil court for the appropriate remedy and not resorted to criminal proceedings against the respondent.

[108] In *Kiran Singh v. Chaman Paswan Kiran Singh v. Chaman Paswan* [1954] 2 MLJ 60; (1955) 1 SCR 117; AIR 1954 SC 340; 1954 SCJ 393, Venkatarama Ayyar J observed that the fundamental principle is well-established that a decree passed by a court without jurisdiction is a nullity, and that its validity could be set up whenever and wherever it is sought to be enforced or relied upon – even at the stage of execution and even in collateral proceedings. A defect of jurisdiction whether it is pecuniary or territorial, or whether it is in respect of the subject matter of the action, strikes at the very authority of the court to pass any decree, and such a defect cannot be cured even by consent of parties.

[109] The power to create or enlarge jurisdiction is legislative in character. Parliament alone can do it by law and no court can enlarge the jurisdiction of a court. (see *AR Antulay v. RS Nayak and another* [1988] 1 MLJ (Crl) 501).

[110] For the reasons set out above, we are satisfied that there are merits in the second preliminary objection.

Conclusion

[111] We are not expressing any opinion on the first preliminary objection and about the merits of the applicant's contention on the legality or propriety of the order appealed against.

[112] Therefore, the appeals are dismissed. The High Court is directed to proceed with the trial.